

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHANTE CUMMINGS, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	No. 05-104
OFFICE OF CATHOLIC EDUCATION,	:	
ARCHDIOCESE OF PHILADELPHIA	:	

ORDER-MEMORANDUM

AND NOW, this 10th day of May, 2005, the “Motion of Defendants to Dismiss Plaintiffs’ Amended Complaint Pursuant to Rule 12(b)(6)” is granted, and plaintiffs’ complaint is dismissed with prejudice. Fed. R. Civ. P. 12(b)(6).¹

Plaintiffs Shante Cummings and Jimerea Lee, minors, through their mothers as natural guardians, filed this civil rights action against the Office of Catholic Education, Archdiocese of Philadelphia² and employees of the OCE, including “Sister Susan,” “Mrs. O’Grady,” Pat Biello,”

¹ “Dismissal for failure to state a claim is appropriate only if it ‘appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” Wheeler v. Hampton Twp., 399 F.3d 238, 243 (3d Cir. 2005), quoting Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003).

The “Motion of Defendants to Strike Plaintiffs’ Second Amended Complaint for Violation of Rule 15(a)” is also granted. Fed. R. Civ. P. 15(a) states, “A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party’s pleading only by leave of court or written consent of the adverse party.” Defendants did not consent to a second amended complaint and plaintiffs did not request leave of court to file one. Leave would not have been granted because any amendment would appear to be futile, given the reasons for dismissal. Foman v. Davis, 371 U.S. 178, 182 (1962) (emphasis added) (“In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of amendment, futility of amendment, etc. - the leave should, as the rules require, ‘be freely given.’”) See also Jablonski v. Pan Am World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988). Plaintiffs’ “Motion for Injunctive Relief” is denied as moot.

² It is unclear whether the OCE is sued as a part of the Archdiocese or in its separate capacity. If, as appears more probable from the allegations of the amended complaint, it is the

and “Jack Palermo.” The amended complaint alleges that plaintiffs were not permitted to participate in the 2004-05 Catholic League basketball season following their transfer from John M. Hallahan Catholic Girls’ School to Saints John Neumann and Maria Goretti High School,³ in violation of their rights under 42 U.S.C. § 1981 (Count I), 42 U.S.C. § 1983 (Count II), 42 U.S.C. § 1985(3), and Article I, §§ 7 and 26 of the Pennsylvania Constitution (Count IV).

According to defendants, Counts II, III and IV must be dismissed, because the OCE is a private institution and did not engage in state action. U.S. v. Morrison, 529 U.S. 598, 625 (2000) (42 U.S.C. § 1983 is “a section which by its terms requires state action before it may be employed.”); United Brotherhood of Carpenters and Joinders of Am. v. Scott, 463 U.S. 825, 883 (1983) (claim under 42 U.S.C. § 1985(3) for violation of First and Fourteenth Amendment rights requires state action); Western PA Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 485 A.2d 1, 6 (1985), aff’d, 515 A.2d 1331 (Pa. 1986) (“provisions of Article I, section 7 [of Pennsylvania Constitution] do not reach acts of purely private individuals”); Pennsylvania Constitution, Article I, § 26 (“neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the

latter, the question of whether the OCE is a suable entity is not reached at this time.

³ On October 29, 2004, plaintiffs, juniors at Hallahan, were involved in a disagreement with faculty regarding the length of a faculty-junior basketball competition. Amended Complaint, ¶¶ 21-28. As punishment for their behavior, plaintiffs were not permitted to participate in “open gym.” Id., ¶¶ 37-42. Additionally, they were assigned “demerits.” Id., ¶¶ 32, 43-52. Plaintiffs’ mothers objected to the demerits, but, unable to obtain relief, chose to transfer their daughters to Neumann-Goretti. Id., ¶¶ 54-60. Prior to the transfer, plaintiffs’ mothers were told that the girls would not be permitted to play basketball at Neumann-Goretti because the transfer was deemed to be related to sports. Id., ¶¶ 57, 62. The girls transferred to Neumann-Goretti and were not permitted to play basketball. Id., ¶ 65. The Neumann-Goretti girls basketball coach unsuccessfully appealed the ruling to the Philadelphia Catholic League Board of Governors. Id., ¶¶ 68, 70-71.

exercise of any civil right”).

Plaintiffs counter that by operating high schools, the OCE “performed a vital, legally mandated governmental function for and on behalf of the Commonwealth of Pennsylvania and in accordance with its laws and policies, especially the Public School Code . . . [and therefore] acted or failed to act under color of state law.” Amended Complaint, ¶ 9. However, mere operation of a school, even where the school receives state funding and is subject to state regulation, does not make a private school a state actor. Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (private school receiving funding and referrals of students from state, and subject to state regulation, was not state actor); Robert S. v. Stetson School, Inc., 256 F.3d 159, 164 (3d Cir. 2001) (private school receiving government funds, performing contracts for City of Philadelphia and subject to government regulation was not state actor).

Moreover, state action cannot be attributed to the OCE in the circumstances described in the amended complaint. Brown v. Phillip Morris, Inc., 250 F.3d 789, 801 (3d Cir. 2001) (three tests used to determine whether acts of private institution can be deemed state action are: 1) public function test; 2) close nexus test; and 3) symbiotic relationship test). Here, the OCE does not perform a function exclusively reserved to the state, Logiodice v. Trustees of Maine Central Institute, 296 F.3d 22, 26 (1st Cir. 2002), citing Pierce v. Society of Sisters, 268 U.S. 510 (1925) (“education is not and has never been a function reserved to the state”). The amended complaint does not allege a close nexus between the Commonwealth and the OCE that would make the OCE a state actor. Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993) (factors indicating a close nexus include amount of contact between state and private party, state’s exercise of coercive power over private party and whether state directly contracted with private party). The amended complaint does not

allege a symbiotic relationship between the Commonwealth and the OCE such that the OCE is a state actor. Brogan v LaSalle Univ., 70 F.Supp.2d 556, 578 (E.D. Pa. 1999), quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (private party is not state actor unless “State has so far insinuated itself into a position of interdependence that it must be recognized as a joint participant in the challenged activity.”).

Because the OCE is not a state actor, and no state action can be attributed to it, Counts II, III, and IV must be dismissed.

As to Count I, discrimination in the enforcement of a contract, the amended complaint alleges that plaintiffs hold scholarships entitling them to attendance at any Philadelphia Catholic school, and that the defendants have deprived them of the benefits of their scholarships by barring them from basketball. Amended Complaint, ¶¶ 73-75. The amended complaint does not, however, allege that the scholarships have been withdrawn, that plaintiffs have not been permitted to remain at Neumann-Goretti, or that the scholarships were linked to plaintiffs’ ability to play basketball. Because the complained of conduct did not interfere with plaintiffs’ scholarships, Count I must be dismissed.

BY THE COURT:

Edmund V. Ludwig, J.